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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

-----	:	
-----	:	Civil Action 07-3638 (AET)
SELVE MUSE-FREEMAN, as duly	:	
appointed guardian of LINDA	:	
MUSE	:	
	:	CIVIL ACTION
	:	Medical Malpractice
Plaintiff,	:	
vs.	:	
	:	
ARMEN SIMONIAN, MD; MERCER	:	MEMORANDUM OF LAW IN OPPOSITION
GASTROENTEROLOGY, PC; IMRAN	:	TO PLAINTIFF'S MOTION IN LIMINE
BHATTI, MD; XYZ CORPORATION;	:	TO PRECLUDE THE TESTIMONY OF F.
ELLEN WINTER; TRENTON	:	DANA FORTUNATO, M.D.
ANESTHESIOLOGY ASSOCIATES;	:	
JOHN/JANE DOE 1-10	:	
(fictitiously named unknown	:	
physicians, nurses and/or	:	
medical personnel who	:	
participated in Linda Muse's	:	
care); and CAPITAL HEALTH	:	
SYSTEM	:	

I. INTRODUCTION

This office represents Defendant, Dr. Imran Bhatti, in the above-captioned matter. With regard to this matter, Dr. Bhatti has retained F. Dana Fortunato, M.D., as an expert in Pulmonary Medicine. A true and accurate copy of Dr. Fortunato's Curriculum Vitae is attached as Exhibit A.

Presently before Your Honor is Plaintiff's Motion in Limine to Preclude the Testimony of F. Dana Fortunato, M.D. In short, Plaintiff argues that Dr. Fortunato's testimony is speculative and seeks to preclude Dr. Fortunato's testimony pursuant to Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Plaintiff inaccurately argues that Dr. Fortunato's testimony is unreliable and contrary to medical evidence. Plaintiff also emptily argues that Dr. Fortunato's opinion is not entirely consistent with other medical professionals who have offered deposition testimony in this matter, which somehow makes Dr. Fortunato's testimony unreliable or speculative. As discussed more fully below, Dr. Fortunato's opinions and testimony are not unreliable nor contrary to medical evidence; furthermore, contradictory expert testimony is not necessarily unreliable. As such, Plaintiff's Motion is meritless and must be denied.

II. FACTUAL BACKGROUND

Plaintiff alleges that Linda Muse was admitted to Capital Health System - Mercer Campus, under the care of Armen Simonian, M.D., complaining of nausea and vomiting on August 5, 2005. On August 6, 2005, an ultrasound of Ms. Muse's gallbladder was obtained which demonstrated the possible presence of gallstones. On August 8, 2005, Ms.

Muse underwent an Endoscopic Retrograde Cholangiopancreatography (ERCP) performed by Dr. Simonian. Dr. Imran Bhatti was the attending anesthesiologist and Elinor Winter was the CRNA for the ERCP performed on August 8, 2005. Plaintiff alleges that prior to the ERCP Ms. Muse was found to have significantly elevated blood pressure and was given medications to lower same. During the procedure, Ms. Muse experienced a drop in oxygen saturation and blood pressure, which defendants responded to by the administration of a chin lift and continued the ERCP. Ms. Muse subsequently suffered a respiratory event which resulted in a drop in pulse, and respiration rate, followed by respiratory failure and cardiopulmonary arrest. Plaintiff contends that as a result of Defendants' collective failures, Plaintiff suffered a respiratory arrest which resulted in brain damage.

On behalf of Defendant, Dr. Bhatti, F. Dana Fortunato, M.D., has authored an expert report setting forth an opinion that that Plaintiff's cardiopulmonary arrest was not secondary to a ventilatory arrest from obstructive lung disease, but that the events which occurred to Plaintiff "were secondary to a combination of cardiac and noncardiac pulmonary edema as a result of the cannulation of the pancreatic duct as well as a vasovagal reaction." See the

August 18, 2008 report of Dr. Fortunato which has been attached to Plaintiff's Memorandum of Law as Exhibit A. In preparing the report, Dr. Fortunato relied on a myriad of sources outlined on the first and second page of said report, including, but not limited to: medical records, deposition transcripts, and expert reports. Dr.

Fortunato's report explains that the end-tidal CO2 monitor was maintained at 38 during the procedure (even though it was not documented during the time of arrest, CRNA Winter testifies that the end-tidal CO2 had not changed). Id.

Therefore, it is not possible that Ms. Muse had suffered a ventilatory arrest; just because the O2 saturation dropped to 50 does not mean that a ventilatory arrest occurred.

Id. With the end-tidal being maintained at a normal level of 38, drops in O2 saturation would occur as a result of ventilation perfusion abnormalities or due to shunting.

Id. Dr. Fortunato also states that it is well known that patients who undergo ERCPs can develop noncardiac pulmonary edema as a result of ERCPs when insufflation of the duodenum, as well as cannulation of the pancreatic duct occurs. Id. Dr. Fortunato explains that this insufflation can result in a vasovagal reaction and a bradycardia, or a noncardiac pulmonary edema, or an adult respiratory distress syndrome. Id. Noncardiac pulmonary edema would

quickly cause an O2 saturation to drop into the 50's from the 90's as seen in Ms. Muse's case. Id. Furthermore, Ms. Muse had multiple medical problems including diabetes mellitus which predisposes her to a stiff diastolic dysfunctioning heart that can develop "flash" pulmonary edema as a result of changes in blood pressure or vasovagal reactions. Id. Moreover, Dr. Fortunato explains that if Ms. Muse had become hypoxic from ventilatory obstruction, one would expect her heart rate to have increased initially and not drop from the normal range to 30 as documented in her case. Id. One would expect the heart rate to increase transiently to levels well over 100 during episodes of ventilatory obstruction or hypoxia, and then drop to the bradycardic range as one normally sees; this did not occur in Ms. Muse's case. Id. For Ms. Muse, there was an immediate drop in her heart rate from normal to 30, and hypoxia which immediately occurred at the same time according to the records. Id.

III. LEGAL ANALYSIS

As Plaintiff points out, expert testimony in the Federal Courts is governed by Federal Rule of Evidence 702. The rule is broadly phrased and the fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all

"specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by knowledge, skill, experience, training or education. Federal Rule of Evidence 702 requires that expert testimony be the product of reliable principles and methods that are reliably applied to the facts of the case; nothing in Federal Rule of Evidence 702 is intended to suggest that experience alone, or experience in conjunction with other knowledge, skill, training, or education may not prove to be a sufficient foundation for expert testimony. In fact, Federal Rule of Evidence 702 contemplates that an expert may be qualified on the basis of experience alone. See e.g., United States v. Jones, 107 F.3d 1147 (6th Cir. 1997); Kumho Tire Co. v .Carmichael, 119 S. Ct. 1167, 1178 (1999).

In response to Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) Federal Rule of Evidence 702 was amended and trial judges were charged with the responsibility to exclude unreliable expert testimony. Daubert set forth a non-exclusive checklist for the courts to use in assessing reliability of expert testimony: whether the expert's technique or theory can be or has been tested; whether the technique or theory has been subject to peer review and publication; the known or potential rate of error of the technique or theory when applied; the

existence and maintenance of standards and controls; and whether the technique or theory has been generally accepted in the scientific community. See generally Daubert, 509 U.S. 579. But see e.g., Kannankeril v. Terminix Int', Inc., 128 F. 3d 802 (3d Cir. 1997) (holding that a lack of peer review or publication was not dispositive of whether the expert's opinion was supported by "widely accepted scientific knowledge").

Other factors relevant in determining reliable expert testimony have also been reported. For example, whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation or whether they have developed their opinions expressly for purposes of testifying, see generally Daubert, 509 U.S. 579; whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, see General Elec. Co. v. Joiner, 522 U.S. 136 (1997); whether the expert has adequately accounted for obvious alternative explanations, see Claar v. Burlington N.R.R., 29 F. 3d 499 (9th Cir. 1994); whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting, see Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997); and whether the

field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give, see Kumho Tire Co. v. Carmichael, 119 S. Ct. 1167, 1175 (1999).

Despite the trial court's role as a gatekeeper, rejection of expert testimony is the exception rather than the rule and Daubert did not intend the trial court's role to replace the adversarial system. United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996). As Daubert notes, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595. When a trial court rules that an expert's testimony is reliable, this does not mean that contradictory expert testimony is unreliable. Federal Rule of Evidence 702 permits testimony that is the product of competing principles or methods in the same field of expertise. Heller v. Shaw Industries, Inc., 167 F. 3d 146, 160 (3d Cir. 1999). Obviously, proponents do not have to show to the judge that the opinions of their experts are correct; they only have to show that their opinions are reliable. The evidentiary requirement of reliability is lower than the merits

standard of correctness. In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994). "Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance." Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998).

Federal Rule of Evidence 702 calls for a quantitative rather than qualitative analysis requiring expert testimony be based on sufficient underlying "facts or data." When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in Federal Rule of Evidence 702 on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other. Commentary on 2000 Amendment to Federal Rule of Evidence 702. As such, the fact that Dr. Fortunato reaches an opinion not held by other retained experts in this matter is of no consequence. The issue of whether any expert's opinion is accepted is entirely up to the trier of fact.

Plaintiff argues that Dr. Fortunato's opinions are unsupported by medical literature; this assertion is not entirely accurate. First, as discussed above, experience alone, or experience in conjunction with other knowledge,

skill, training, or education may prove to be a sufficient foundation for expert testimony. Dr. Fortunato is Board Certified in both Internal and Pulmonary Medicine and has been a practicing physician for approximately thirty years. Second, Dr. Fortunato's opinions are based upon a review of the medical records, deposition testimony, and expert reports. When asked, Dr. Fortunato provided his opinion that Plaintiff suffered a flash pulmonary edema; Dr. Fortunato also provided the reasoning behind his opinion based on the medical records. See Plaintiff's Exhibit B at 26:17 - 27:18. Dr. Fortunato was also asked to explain flash pulmonary edema, which Plaintiff's counsel admits there is literature to support. Plaintiff's counsel argues that Plaintiff's experts will testify that pulmonary edema will manifest with clinical signs and will not just disappear. Counsel's assertion does not coincide with the various experts' testimony as set forth below. Again the issue of which experts' opinion is believed to be true is left to the trier of fact. In any event, the beginning of Dr. Fortunato's explanation is attached as part of Plaintiff's Exhibit B in an attempt to discredit Dr. Fortunato for making an assumption based on the medical records. See Plaintiff's Exhibit B at 43:3-23. Plaintiff's counsel, however, failed to include the

entirety of Dr. Fortunato's explanation as well as counsel's follow-up questions regarding where and how Dr. Fortunato reached his opinions. A true and accurate copy of relevant portions of Dr. Fortunato's deposition transcript has been attached as Exhibit B. Plaintiff skips over this pertinent information. See Exhibit B at 43:5 - 54:17 Plaintiff then points to a specific, incomplete, portion of testimony, taken out of context, to support a position that there was nothing heard in Plaintiff's lungs consistent with pulmonary edema. See Plaintiff's Exhibit B at 50:15-25. Plaintiff argues that Dr. Fortunato supplies no literature to support this opinion, but while Dr. Fortunato agrees that there was nothing heard in the lungs consistent with pulmonary edema, he goes on to explain that in a case of flash, or transient, pulmonary edema, the physicians would not necessarily hear anything in the lungs or have any findings of pulmonary edema or congestive heart failure on chest X-ray. See Exhibit B at 23:19 -25:18; 50:20 - 51:11. Plaintiff seems only to fault Dr. Fortunato for believing that the line of reasoning in the doctors' notes and diagnoses in the chart are incorrect. See Plaintiff's Exhibit B at 34:9-21.

Plaintiff's argument that Dr. Fortunato's opinions are contrary to that of every other medical professional is of

no consequence, as described above. However, to be thorough, Plaintiff's contention is also inaccurate. It should also be noted that none of the testimony Plaintiff cites has been issued by a specialist in Pulmonary Medicine. Plaintiff refers to the testimony of: Dr. Steven Konstadt, Board Certified in Anesthesiology with a certification in peri-operative Echocardiography; Dr. Charles Goldberg, Board Certified in Internal Medicine and Gastroenterology; Dr. Charles Maltz, Board Certified in Emergency Medicine, Internal Medicine, and Gastroenterology; Dr. Adam Elfant, Board Certified in Internal Medicine and Gastroenterology; and Dr. Gerald Lefever, Board Certified in Anesthesiology.

Plaintiff cites to the deposition testimony of anesthesiologist, Dr. Steven Konstadt, who testified to the absence of findings supporting a diagnosis of pulmonary edema. However, a reading of Dr. Konstadt's testimony reveals that: hearing evidence of fluid in the lungs is one indication of pulmonary edema; a normal echocardiogram is not absolutely inconsistent with a diagnosis of cardiac pulmonary edema; and pulmonary edema may be present despite the absence of physical findings on chest X-ray. See Plaintiff's Exhibit C at 144:13 - 146:7. Dr. Konstadt testified that, in patients with pulmonary edema, one would

see pink frothy fluid. Id. at 146:5-7. However, as pulmonologist, Dr. Fortunato, explained, frothy sputum is an obvious diagnosis that is an end stage of the pulmonary edema situation. See Exhibit B at 44:19 - 45:15. Dr. Konstadt also testified that Dr. Bhatti's postoperative note would not be consistent with a persistent pulmonary edema; Dr. Konstadt was not asked, however, whether the records would be consistent with a flash pulmonary edema. See Plaintiff's Exhibit C at 146:14 - 147:2.

Plaintiff cites to the deposition of gastroenterologist, Charles S. Goldberg, M.D., to support the contention that there was an absence of any clinical findings supporting a diagnosis of pulmonary edema. Again, Plaintiff's contention is inaccurate. In fact, Dr. Goldberg testified that the chart does contain a diagnosis of pulmonary edema. Dr. Goldberg testified that "in the chart there's something called the BNT level that is a measure of congestive heart failure. It's an objective measure of congestive heart failure. Pulmonary edema is a form of congestive heart failure. So there's clearly evidence of suggestive [sic] heart failure." See Plaintiff's Exhibit D at 71:4-15. As Dr. Fortunato also explained at deposition, congestive heart failure is the same as cardiac pulmonary edema. See Exhibit B at 29:11-

21. Furthermore, Dr. Goldberg has submitted two expert reports in this matter which agree with Dr. Fortunato's evaluation of the facts of this case. The first, dated August 6, 2008, was served on August 15, 2008; and the second, dated November 5, 2008, was served on November 14, 2008. True and accurate copies of Dr. Goldberg's two expert reports have been attached as Exhibit C and D, respectively. A reading of Dr. Goldberg's report reveals Dr. Goldberg's opinion that "Ms. Muse-Freeman experience [sic] bradycardia and hypotension leading to cardiopulmonary arrest and hypoxia. Bradycardia, myocardial ischemia and vasovagal events are well known to occur during all types of endoscopic procedures including ERCP and not related to any negligence on the part of the gastroenterologist or anesthesiologist." See Exhibit C at page 5. Dr. Goldberg goes on to opine that "[i]n this patient with a history of diabetes, hypertension, cardiomegaly, and congestive heart failure, these primary cardiac events are more likely." Id. After reading the deposition of Dr. Konstadt, Dr. Goldberg supplemented his August 6, 2008 expert report to include "Dr. Konstadt accepts that the facts of the case are consistent with primary bradycardia alone leading to reduced brain perfusion and subsequent hypoventilation. This clearly

supports the contention in my original letter." See Exhibit D. Obviously, neither Dr. Goldberg or Dr. Konstadt are at odds with Dr. Fortunato's opinions, as Plaintiff would have the Court believe.

Plaintiff also cites to the deposition of gastroenterologist, Charles Maltz, M.D., for support of the same contention. However, Dr. Maltz testified that he did not see in the medical record those signs that one may or may not see in the case of transient pulmonary edema. See Plaintiff's Exhibit E. Dr. Maltz testified that: he did not recall seeing a diagnosis of pulmonary edema in the chart, while one may hear fluid in the lungs there was no indication in the record that anyone did; and that the uncommon occurrence of seeing pink frothy material was not recorded. Id. at 138:19 - 140:2. Dr. Maltz stated that the chest X-rays did not show findings typical for pulmonary edema and that he could not recall the results of the echocardiogram. Id. at 140:3-18. As established, however, lung sounds and physical findings may not always be present in cases of pulmonary edema. Furthermore, Dr. Maltz stated that he saw reference to pulmonary edema in an expert report. Id. at 138:14-18. Experts may base their opinions on any material made known to the expert if of a type reasonably relied upon by experts in the particular

field, including other's expert reports. See Federal Rule of Evidence 703.

Plaintiff also states that gastroenterologist, Adam Elfant, M.D., believes that Plaintiff did not suffer from pulmonary edema. However, Dr. Elfant's testimony, attached as Plaintiff's Exhibit F, clearly shows that Dr. Elfant recalled seeing pulmonary edema and congestive heart failure as part of Plaintiff's medical history and that pulmonary edema is part of congestive heart failure. See Plaintiff's Exhibit F at 130:18 - 131:18. Not included in Plaintiff's Exhibit F is Dr. Elfant's testimony concerning the findings of pulmonary edema. A true and accurate copy of relevant portions of Dr. Elfant's deposition testimony is attached as Exhibit E. Dr. Elfant testified that he focused his review on the first few days of Plaintiff's hospitalization and while he did not see any physical findings in the pre-arrest care, "in early congestive heart failure, you may not have findings on physical examination." See Exhibit E at 131:25 - 134:7.

Additionally, Plaintiff cites to the testimony of anesthesiologist, Gerald Lefever, to support the contention that pulmonary edema was not diagnosed. See Plaintiff's Exhibit G. Again, however, Dr. Lefever testified that he remembered some discussion about pulmonary edema, but that

he did not recall physical findings, such as the end stage pink frothy sputum, that would suggest to him a diagnosis of pulmonary edema. Id. at 125:16 - 126:11. Again, as testified to by various experts, a physical examination may not always reveal signs of pulmonary edema.

Plaintiff's argument that Dr. Fortunato's opinions are based on facts not of record is also inaccurate. As described above, Dr. Fortunato continually explained how his opinions were based upon a review of Plaintiff's medical record; specifically pointing to area's of Plaintiff's chart. See e.g., Exhibit B at 45:16 - 46:7. Furthermore, Plaintiff's own expert, James F. Noone, M.D., seems to testify that the medical records support Dr. Fortunato's opinions. A true and accurate copy of relevant portions of Dr. Noone's deposition transcript has been attached as Exhibit F. Dr. Noone agrees that the hypothesis that the sequence of events, hypoventilation on to airway obstruction, is "entirely inconsistent" with the medical records. See Exhibit F at 168:7-23; 179:20 - 180:9.

IV. CONCLUSION

Plaintiff does not challenge that Dr. Fortunato is qualified to render an opinion as an expert nor does Plaintiff challenge that Dr. Fortunato's testimony would be

"fit", that is of assistance to the trier of fact.

Plaintiff only argues that Dr. Fortunato's opinions are unreliable. However, Dr. Fortunato, as discussed above, has based his opinion squarely upon the medical records and his thirty years of experience in Pulmonary Medicine. Contrary to Plaintiff's arguments, as demonstrated, Dr. Fortunato's opinions are not unreliable, contrary to medical evidence, or contrary to the opinion of every other medical professional. As such, Plaintiff's Motion to preclude the testimony of Dr. Fortunato must be denied.

Respectfully submitted,

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Imran Bhatti, M.D.

By: Michael P. Opacki
Michael P. Opacki, Esq.

DATED: January 26, 2009

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I certify that one copy of the within Memorandum of Law in Opposition to Plaintiff's Motion in Limine to Preclude the Testimony of F. Dana Fortunato, M.D., and Exhibits were filed electronically with the Clerk of The United States District Court for the District of New Jersey and one copy was sent via Regular Mail to:

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I hereby certify that the foregoing statements made by
me are true. I am aware that if any of the foregoing
statements are willfully false, I am subject to punishment.

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Attorneys for Defendant,
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By: Michael P. Opacki
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DATED: January 26, 2009